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Fifth report on reservations to treaties

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Addendum

Part Two

Procedure regarding reservations and interpretative declarations

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307. The question arises, however, whether a distinction should not be made between, on the one hand, objections in principle to the formulation of late reservations and, on the other hand, "traditional" objections, such as those that can be made to reservations pursuant to article 20, paragraph 4 (b), of the Vienna Conventions of 1969 and 1986. This distinction appears to be necessary, for it is hard to see why co-contracting States or international organizations should not have a choice between all or nothing, that is to say, either accepting both the reservation itself and its lateness or preventing the State or organization which formulated it from doing so, whereas they may have reasons that are acceptable to their partners. Furthermore, in the absence of such a distinction, States and international organizations which are not parties when the late reservation is formulated but which become parties subsequently through accession or other means would be confronted with a fait accompli. Paradoxically, they could not object to a late reservation, whereas they are permitted to do so under article 20, paragraph 5,[524] relating to reservations formulated when the reserving State expresses its consent to be bound.[525]

308. The unanimous consent of the other contracting parties should therefore be regarded as necessary for the *late formulation* of reservations. On the other hand, the normal rules regarding acceptance of and objections to reservations, as codified in articles 20 to 23 of the Vienna Conventions, should be applicable as usual with regard to the actual content of late reservations, to which the other parties should be able to object "as usual".

309. In view of these remarks, the Commission could adopt two draft guidelines. The first one could establish the principle that a late reservation must be accepted unanimously, while the second would explain the consequences of an objection to such a reservation.

310. With regard to the principle, it would no doubt be useful to present it clearly as an exception to the basic principle that late reservations are prohibited. Accordingly, draft guideline 2.3.1 could be drafted as follows:

> ***2.3.1*** *Reservations formulated late*
>
> *Unless the treaty provides otherwise, a State or an international organization may not formulate a reservation to a treaty after expressing its consent to be bound by the treaty unless the other contracting Parties do not object to the late formulation of the reservation.*

311. In view of the interest attached to avoiding late reservations to the extent possible, the phrase "unless the treaty provides otherwise", which introduces the draft guideline proposed above, should be interpreted strictly. Under these circumstances, the Commission might do well to adopt "model clauses" (as it

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524 "... a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation *or by the date on which it expressed its consent to be bound by the treaty, whichever is later*" (italics added).

525 It would be equally paradoxical to allow States or international organizations which become parties to the treaty after the reservation is entered to object to it under art. 20, para. 4 (b), whereas the original parties cannot do so.

expressed the intention to do in 1995[526]), indicating to States and international organizations the type of provisions which it might be useful to include in a treaty in order to avoid any ambiguity in this regard.

312. Such model clauses could be based on the provisions cited above,[527] on the understanding that in order to avoid any uncertainty with regard to reservations formulated after the expression of consent to be bound, but before the entry into force of the treaty, it would no doubt be preferable for such clauses to avoid referring to the entry into force. They might read as follows (alternatively, of course):

> ***Model clause 2.3.1*** — *Reservations formulated after the expression of consent to be bound*
>
> *A. A contracting party may formulate a reservation after expressing its consent to be bound by the present treaty.*
>
> *B. A contracting party may formulate a reservation to the present treaty [or to articles X, Y and Z of the present treaty] when signing, ratifying, formally ratifying, accepting or approving the treaty or acceding thereto at any time thereafter.*
>
> *C. A contracting party may formulate a reservation to the present treaty [or to articles X, Y and Z of the present treaty] at any time by means of a notification addressed to the depositary.*

313. Draft guideline 2.3.3 might read as follows:

> ***2.3.3*** *Objection to reservations formulated late*
>
> *If a contracting Party to a treaty objects to a reservation formulated late, the treaty shall enter into or remain in force in respect of the reserving State or international organization without the reservation being made.*

314. The considerations which explain the hesitations seen in practice with regard to late reservations apply also with regard to the length of time in which the other contracting Parties must give their consent and the form that such consent must take.[528] On the one hand, there would be no way to prevent all the contracting parties from accepting a modification in the way that the treaty applies to one of them; on the other hand, that possibility must be confined within narrow and specific limits, or else the very principle laid down in article 19 of the Vienna Conventions would be undermined.

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526 Cf. the report of the Commission on the work of its forty-seventh session: "The Commission should try to adopt a guide to practice in respect of reservations. In accordance with the Commission's statute and its usual practice, this guide would take the form of draft articles whose provisions, together with commentaries, would be guidelines for the practice of States and international organizations in respect of reservations; *these provisions would, if necessary, be accompanied by model clauses" (Yearbook ... 1995*, vol. II, Part Two, p. 108, para. 487 (b)) (italics added).

527 Para. 289.

528 One might consider that what is involved here are questions relating to the formulation of acceptances of or objections to reservations, the subject of chap. IV of the present report. From a purely abstract standpoint, that is correct. In the view of the Special Rapporteur, however, these questions are so closely related to the issue of late reservations that it is useful, as a practical matter, to address them at the same time as the latter.

315. With regard to the form, just as reservations formulated within the set periods may be accepted tacitly,[529] it should likewise be possible for late reservations to be accepted in that manner (whether their late formulation or their content is at issue), and for the same reasons. It seems fairly clear that to require an express unanimous consent would rob the (at least incipient) rule that late reservations are possible under certain conditions of any substance, for, in practice, the express acceptance of reservations at any time is rare indeed.[530]

316. Such is, moreover, the practice followed by the Secretary-General of the United Nations[531] and by the secretaries-general of the Customs Cooperation Council (World Customs Organization (WCO))[532] and the International Maritime Organization (IMO),[533] all of whom considered that a new reservation enters into force in the absence of objections from the other contracting parties.

317. It remains to be determined, however, how much time the other contracting parties have to respond to a late reservation. A similar question arises with regard to amendments to existing reservations and is addressed in greater detail in section B of the present chapter.

318. With regard to late reservations in the strict sense, practice is ambiguous. To the knowledge of the Special Rapporteur, the secretaries-general of IMO, the Council of Europe or WCO proceeded in an empirical manner and did not set any specific periods when they consulted the other contracting parties.[534] That was not true for the Secretary-General of the United Nations.

319. In the first place, when the Secretary-General's current practice was inaugurated in the 1970s, the parties were given a period of 90 days in which to object to a late reservation, where appropriate. Nevertheless, the choice of this period seems to have been somewhat circumstantial; it happens to have coincided with the period provided for in the relevant provisions of the Convention for the Settlement of Certain Conflicts of Laws in connection with Cheques, of 1931, to which France sought to make a new reservation.[535] That notwithstanding, the 90-day period was adopted whenever a State availed itself thereafter of the opportunity to formulate a new reservation, or modify an existing one, after the entry into force with respect to that State of a new treaty of which the Secretary-General was depositary.[536]

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[529] Cf. art. 20, para. 5, of the Vienna Conventions (in the 1986 text): "... unless the treaty otherwise provides, a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty ..."

[530] See chap. IV, sect. 1, above.

[531] See paras. 296-298 above.

[532] See para. 299 above.

[533] See para. 300 above.

[534] It would appear, however, that the Secretary-General of IMO considers that, in the absence of a response within one month following notification, the reservation becomes effective (cf. footnote 511 above and IMO, *Status of Multilateral Conventions and Instruments in Respect of Which the International Maritime Organization or its Secretary-General Performs Depositary or Other Functions as at 31 December 1999*, concerning the reservation of Liberia, p. 81, and that of the United States of America, p. 86).

[535] See paras. 296-297 above.

[536] See para. 298 above.

320. In practice, however, the period proved to be too short; owing to the delays in transmission of the communication by the Office of the Legal Counsel to States, the latter had very little time in which to examine these notifications and respond to them, whereas such communications are likely to raise "complex questions of law" for the parties to a treaty, requiring "consultations among them, in deciding what, if any, action should be taken in respect of such a communication".[537] It is significant, moreover, that in the few situations in which parties took action, such actions were formulated well after the 90-day period that had theoretically been set for them.[538]

321. For this reason, following a note verbale from Portugal reporting, on behalf of the European Union, on difficulties linked to the 90-day period, the Secretary-General announced, in a circular addressed to all Member States, a change in the practice in that area. From then on, if a State which had already expressed its consent to be bound by a treaty formulated a reservation to that treaty, the other parties would have a period of 12 months after the Secretary-General had circulated the reservation to inform him that they wished to object to it.[539]

322. In taking this decision, which will also apply to the amendment of an existing reservation,[540] "the Secretary-General [was] guided by article 20, paragraph 5, of the [Vienna] Convention, which indicates a period of twelve months to be appropriate for Governments to analyse and assess a reservation that has been formulated by another State and to decide upon what action, if any, should be taken in respect of it".[541] The decision meets the concerns of States and falls within the current trend towards establishing a "reservation dialogue" between a State which intends to formulate a reservation and the other contracting parties,[542] facilitating such a dialogue through the length of time it allows.

323. This long period has one drawback, however: during the 12 months following notification by the Secretary-General,[543] total uncertainty prevails as to the fate of the reservation that has been formulated, and if a single State objects to it at the last minute, that is sufficient to consider it as not having been made.[544] The question arises, therefore, whether an intermediate solution (six months, for example), would not have been wiser. Nevertheless, taking into account the provisions of article 20, paragraph 5, of the Vienna Conventions and the recent announcement by the Secretary-General of his intentions, it probably makes more sense to bring the Commission's position — which, in any event, has to do with progressive development and not with codification in the strict sense — into line with theirs.

324. Likewise, in view of the different practices followed by other international organizations acting as depositaries,[545] it would no doubt be wise to reserve the

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[537] Memorandum from the United Nations Legal Counsel addressed to the Permanent Representatives of States Members of the United Nations, 4 April 2000.

[538] Cf. the response by Germany to the French reservation to the 1931 Convention on cheques, issued one year following the date of the French communication (para. 297 above).

[539] See footnote 535 above.

[540] See sect. B below.

[541] Memorandum, loc. cit.

[542] On the concept of a "reservation dialogue", see chap. IV below.

[543] In other words, not the communication from the State announcing its intention to formulate a late reservation. This is highly debatable; the question will be considered in chap. IV of the present report.

[544] See paras. 304-305 above.

[545] See para. 316 above.

possibility for an organization acting as depositary to maintain its usual practice, provided that it has not elicited any particular objections.

325. Based on article 20, paragraph 5, of the Vienna Convention of 1986, as adapted to the specific case of late reservations, draft guideline 2.3.2 could therefore be drafted as follows:

> ***2.3.2*** *Acceptance of reservations formulated late*
>
> *Unless the treaty provides otherwise or the usual practice followed by the depositary differs, a reservation formulated late shall be deemed to have been accepted by a contracting party if it has made no objections to such formulation after the expiry of the 12-month period following the date on which notification was received.*

(ii) Late interpretative declarations

326. Like reservations, interpretative declarations can be late. This is obviously true for conditional interpretative declarations, which, like reservations themselves, can be formulated (or confirmed) only when expressing consent to be bound, as stipulated in draft guidelines 1.2.1 and 2.4.4. But it may also be true for simple interpretative declarations which may, in principle, be formulated at any time,[546] either because the treaty itself sets the period in which they can be made or because of circumstances surrounding their formulation.[547]

327. The declarations formulated on 31 January 1995 by the Egyptian Government, which had ratified the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, constitute a striking example of late formulation.[548]

328. Under article 26, paragraph 2, of the Convention, a State may, within certain limits, formulate such declarations, but only "when signing, ratifying, accepting, approving, or formally confirming or acceding to this Convention". Several parties contested the admissibility of the Egyptian declarations, either because, in their view, the declarations were really reservations (prohibited by article 26, paragraph 1) or because they were late.[549]

329. Accordingly, the Secretary-General of the United Nations, depositary of the Basel Convention, "in keeping with the depositary practice followed in similar cases, ... proposed to receive the declarations in question for deposit in the absence of any objection on the part of any of the Contracting States, either to the deposit itself or to the procedure envisaged, within a period of 90 days from the date of their circulation".[550] Subsequently, in view of the objections received from certain contracting States,[551] the Secretary-General "[took] the view that he [was] not in a

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[546] Cf. draft guideline 2.4.3.

[547] See paras. 274-277 above.

[548] See *Multilateral treaties deposited with the Secretary-General — Status as at 31 December 1999*, vol. II, United Nations, New York, 2000, Sales No. E.00.V.2, pp. 357-358.

[549] See the observations by the United Kingdom, Finland, Italy, the Netherlands or Sweden (*Multilateral treaties deposited with the Secretary-General — Status as at 30 April 1995*, United Nations, New York, 1996, Sales No. E.96.V.5, pp. 897-898 — the 2000 edition of this publication is incomprehensible).

[550] Ibid., p. 897.

[551] See para. 328 above.

position to accept these declarations [formulated by Egypt] for deposit",[552] declined to include them in the section entitled "Declarations and Reservations", and reproduced them only in the section entitled "Notes", accompanied by the objections concerning them.

330. In truth, whether what is at issue are conditional declarations formulated after the expression of consent to be bound or simple interpretative declarations whose formulation is limited to certain periods, there does not seem to be any reason to deviate from the rules applicable to late reservations.

331. These rules should therefore be transposed to late interpretative declarations (whether what is at issue are simple interpretative declarations, where the treaty limits the possibility of making such declarations to specified periods, or conditional declarations) in draft guidelines 2.4.7 and 2.4.8, based on draft guideline 2.3.1:

> ***2.4.7*** *Interpretative declarations formulated late*
>
> *Where a treaty provides that an interpretative declaration can be made only at specified times, a State or an international organization may not formulate an interpretative declaration on that treaty at another time, unless the late formulation of the interpretative declaration does not elicit any objections from the other contracting Parties.*
>
> ***2.4.8*** *Conditional interpretative declarations formulated late*
>
> *A State or an international organization may not formulate a conditional interpretative declaration on a treaty after expressing its consent to be bound by the treaty unless the late formulation of the declaration does not elicit any objections from the other contracting Parties.*

332. It is self-evident that the approaches laid down in draft guidelines 2.3.2 and 2.3.3 can also be transposed to acceptances of interpretative declarations formulated late and objections to such formulation. Nevertheless, it is probably not useful to overburden the Guide to Practice by including express draft guidelines in this respect, and it probably suffices to state as much in the commentary on the draft guidelines proposed above.

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[552] *Multilateral treaties deposited with the Secretary-General — Status as at 30 April 1995* ..., p. 897.